No. 49280-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ZACKARY COURTOIS,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Zackary Courtois brought a Petition for Judicial Review under Washington's Administrative Procedure Act (APA), RCW 34.05, et. seq., to reverse final adjudicative orders issued by the state Department of Social and Health Services (DSHS) Board of Appeals (BOA). The agency orders terminated Mr. Courtois' eligibility for services provided by the DSHS Division of Developmental Disabilities (DDA).

The Petition for Judicial Review was successful. The trial court reversed the agency orders and reinstated Mr. Courtois' DDA eligibility. The court agreed that the agency's interpretation of its own DDA eligibility rules contradicted the plain language of the rules themselves, and that the agency's fact finding, by which it rejected necessary testing that established Mr. Courtois' DDA eligibility, was not supported by substantial evidence.

Although it determined that the agency's legal conclusions and fact finding in Mr. Courtois' case must be reversed on judicial review, the trial court declined to award fees and costs under the Washington's Equal Access to Justice Act (EAJA), RCW 4.84.340, et. seq. The court denied fees and costs based on a finding that the agency's final orders, while legally incorrect and factually unsupported, were nevertheless "substantially justified."

The Court of Appeals should reverse the trial court's denial of Mr. Courtois' motion for attorney fees and costs under the EAJA. The trial court's determination that the agency's final orders in Mr. Courtois' case were substantially justified is contradicted by the court's own findings and conclusions on judicial review that resulted in the reversal of those same agency orders. An agency's adjudicative order cannot both violate the plain language of its own eligibility rules and be unsupported by substantial evidence, and yet still be "substantially justified" for purposes of the EAJA. The trial court's failure to award fees and costs under the EAJA in Mr. Courtois' case constituted an abuse of discretion.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in its determination that the agency's final orders in Mr. Courtois' case, while legally incorrect and factually unsupported, nevertheless had a reasonable basis in law and fact, and were therefore "substantially justified."

2. The trial court erred in its denial of Mr. Courtois' motion for attorney fees and costs under the EAJA.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a final agency order that contains conclusions of law that are contrary to the plain language of the agency's own regulation can nevertheless be "substantially justified" under the EAJA.
2. Whether a final agency order that contains fact finding that is not supported by substantial evidence can nevertheless be "substantially justified" under the EAJA.
3. Whether after determining that a state agency adjudicative order violates the plain language of the agency's own eligibility rules, and is unsupported by substantial evidence, a trial court commits an abuse of discretion when it declines to award fees and costs under the EAJA based on a finding that the same agency order is "substantially justified."

IV. STATEMENT OF THE CASE

1. Appellant's Developmental and Diagnostic History

Zackary Courtois is a 19-year-old Pierce County resident. CP 562. He has been a client of the DSHS DDA since 2002. CP 31. He has significant life-long intellectual and adaptive functioning deficits. *See e.g.*, CP 250-256, 299, 189-191.

As a child, Mr. Courtois' treating doctor attributed his intellectual and adaptive deficits to an extensive list of diagnosed developmental and mental disorders including Static Encephalopathy, Attention Deficit

Hyperactivity Disorder (ADHD), Asperger's Disorder, Cognitive Disorder-NOS, Obsessive Compulsive Disorder (OCD), Speech-Language Disorder, Social Learning Disorder, and Dyspraxia. CP 33-34, 299, 315.

In 2013, the diagnostic manual used by clinicians to diagnose developmental and mental disorders, the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), was updated and revised. CP 32, 178-180. The new DSM-Fifth Edition (DSM-V) contains a new diagnosis, Autism Spectrum Disorder (ASD) (Diagnostic Code 299). *Id.*[1]

Zackary Courtois' diagnosis list changed significantly after the DSM was updated and revised to add the new ASD diagnosis. *See* CP 316, 521, 523, 528-529. By January 2015, his doctor no longer diagnosed him with ADHD, Asperger's Disorder, or the multiple other developmental and mental disorders identified in early and mid-childhood. CP 528-529. All were replaced by the ASD diagnosis. *Id.* His treating

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[1] According to the DSM-V, the "essential features" of ASD include:

> Persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interests, or activities (Criterion B). These symptoms are present from early childhood and limit or impair everyday functioning (Criteria C and D).

CP 182. The updated DSM-V both added the ASD diagnosis and eliminated several diagnoses present in earlier versions of the manual. Those previous diagnoses that were subsumed into the new ASD diagnosis include Autistic Disorder, Asperger's Disorder, and Pervasive Developmental Disorder. CP 180.

doctor now attributes Zackary's ongoing functional deficits solely to ASD. CP 189-191, 528-529.

2. The Administrative Proceedings Below

DSHS reviewed Zackary's eligibility for DDA services in 2013 at age 17. CP 232. A notice terminating his DDA eligibility was sent in December 2013. CP 233-236. The resulting administrative appeal was heard by an administrative law judge in January 2015. CP 84. Mr. Courtois' representative argued at the administrative hearing that Zackary remained DDA eligible based on new DDA eligibility rules, promulgated in July 2014, that specifically identify the new ASD diagnosis as a DDA-qualifying condition, and set new DDA eligibility criteria for individuals diagnosed with ASD. CP 384-387.

The administrative hearing included testimony from the DDA supervisor in charge of the eligibility decision in Mr. Courtois' case. CP 390. The supervisor testified that Mr. Courtois' ASD diagnosis was adequately documented in the record, CP 443, and that the record contained reported IQ scores from testing conducted in February 2013, and adaptive function scores, from testing conducted April 2014, that are, on their face, DDA qualifying scores. CP 443,[2] 447.[3]

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[2] The qualifying adaptive function test score is from an April 28, 2014 ABAS-II adaptive assessment conducted by school psychologist Brian Rice. CP 170-171. The April 2014

The worker testified, however, that the eligibility team in Mr. Courtois' case reviewed his medical and school records and determined that they contained multiple other developmental and mental diagnoses, in addition to ASD. CP 444. The eligibility team determined the DDA's rules governing individuals who are "dually diagnosed" with a DDA qualifying condition, and an unrelated mental illness or psychiatric condition, applied in Mr. Courtois' case. CP 444-445. The supervisor testified that the dual diagnosis rules prevented the DDA from accepting Mr. Courtois' otherwise qualifying IQ and adaptive function test scores. CP 454-455.

In April 2015, the administrative law judge issued an *Initial Decision* that affirmed the termination of Mr. Courtois' DDA eligibility. CP 84-96 The ALJ agreed that the DDA eligibility rules governing "dually diagnosed" applicants applied in Mr. Courtois' case, and prevented the Department from accepting his otherwise qualifying IQ and adaptive test scores. CP 95.

In addition, although not raised as an issue by either side at hearing, the ALJ mistakenly found that "Zackary's mother administered"

ABAS-II testing resulted in a DDA-qualifying "adaptive behavior composite score" of 50. *Id, See* WAC 388-823-0740(1).

[3] The qualifying IQ score is from WISC-IV testing conducted a February 6, 2013 by neuropsychologist Hillary Shurrteff that resulted in a DDA-qualifying "FSIQ" of 80. AR 302-305. *See* WAC 388-823-0510(2), WAC 388-823-0720.

the DDA-qualifying April 2014 adaptive function testing, CP 90.[4] Based on this mistaken finding of fact, the ALJ concluded the adaptive testing violated DDA's rule requiring that testing be "administered by a qualified professional." CP 95.

Mr. Courtois sought review of the ALJ's Initial Order by the DSHS Board of Appeals. CP 76-82. In June 2015, a BOA Review Judge issued the Department's *Review Decision and Final Order* in Mr. Courtois' case. CP 31. The *Review Decision and Final Order* affirmed the termination of Zackary's DDA eligibility. CP 55. The Review Judge determined that the DDA eligibility rules governing "dually diagnosed" applicants applied in Mr. Courtois' case, and prevented the Department from accepting Mr. Courtois' otherwise qualifying IQ and adaptive test scores. CP 52-54 (COL 14, 16).

Specifically, regarding Mr. Courtois' multiple developmental and mental disorders diagnosed in early and mid-childhood, the Review Judge concluded that:

> Dr. Daniel's current claim that Appellant no longer suffers from these other conditions does not overcome the need to show that the other conditions did not have a

[4] The ALJ's mistake regarding who "administered" the adaptive test was apparently based on the report in the record containing the April 2014 adaptive test results. *See* CP 170-171. The report indicates that Zackary's mother "rated" Zackary's functioning for purposes of the test, and that her ratings were "scored and interpreted" by the school psychologist who wrote the report. *Id.* at 170.

> disqualifying influence on the FSIQ score at the time the test was administered.

AR 52 (COL No.14).

The *Review Decision and Final Order* similarly rejected the otherwise qualifying April 2014 adaptive function test scores. CP 54 (COL 16). Although Mr. Courtois' treating doctor testified at hearing that Zackary's ASD diagnosis replaced his various listed childhood developmental and mental disorders, and that ASD was the only diagnosed condition currently affecting his day-to-day adaptive functioning, CP 528-529, the Review Judge concluded that the doctor's statements did not permit consideration of Mr. Courtois' otherwise qualifying adaptive score because her hearing testimony:

> came well after the administration of the adaptive skills test and Dr. Daniels was not involved in the administration of the test.

CP 54 (COL No. 16).

The *Review Decision and Final Order* also noted that the school psychologist's report containing the qualifying adaptive function test scores did not indicate that Mr. Courtois himself was interviewed or observed as part of the April 2014 adaptive testing, CP 53 (COL 15), and that the report "specifically states that it was Kathy Courtois who 'rated' Appellant's skills." *Id.* The Review Judge determined the resulting

adaptive score could therefore not be accepted by DDA because it was not established that the test was "administered and scored by a qualified professional as required by WAC 388-823-0740(1)(a)." CP 53-54 (COL15).

Mr. Courtois' request that the DSHS BOA review judge reconsider the *Review Decision and Final Order* in his case was denied on July 15, 2016. CP 9. The BOA's *Order on Reconsideration* specifically mentions Zackary's childhood diagnoses of ADHD and Obsessive Compulsive Disorder, and concludes that DDA's eligibility rules require that he be considered dually diagnosed with these conditions because "the evidence in the hearing record does not show that there was a specific and affirmative dismissal of these mental illness diagnoses prior to the administration" of the otherwise qualifying IQ and adaptive tests. *Id.*

In response to the factual claims in the *Review Decision and Final Order* regarding the administration of the adaptive testing, Mr. Courtois' representative submitted extensive materials to the BOA with the reconsideration request, including excerpts from a treatise on children's psychological testing, CP 192-200, and training materials from the publisher of the ABAS-II adaptive test used in Mr. Courtois' case. CP 199-221. The materials explained and established that adaptive function testing always relies on ratings regarding the subject's functioning from

someone who knows the subject well, such as a parent or other care provider, *see e.g.,* CP 195, and that the procedures used by the school psychologist who administered the adaptive testing in Mr. Courtois' case are the standard required procedures used for both the specific adaptive test used in Mr. Courtois' case, and for all adaptive testing. *See e.g.*. CP 200, 203.

Despite the additional submissions, the BOA refused to modify its determination that "[a]ppellant has not proven .. .. .. that the adaptive skills test was effectively 'administered' and scored by a qualified professional," CP 10, 53-54.

On August 13, 2015, Mr. Courtois' sought judicial review in Pierce County Superior Court of the DSHS BOA's *Review Decision and Final Order* and *Order on Reconsideration.* CP 1.

3. Proceedings in Superior Court

Following briefing and oral argument to the trial court, Pierce County Superior Court Judge Jerry Costello issued a *Final Order on Petition for Judicial Review of State Agency Action* on May 20, 2016. CP 621. Regarding the DDA eligibility rules that govern the agency's review of IQ and adaptive test results of "dually diagnosed" applicants, the trial court concluded that:

> By their plain terms [DDA's dual diagnosis rules] apply only if an applicant is currently dually diagnosed with a qualifying developmental disability and a separate mental illness, or other psychiatric condition. The evidence presented at hearing in this matter, including the testimony provided by Mr. Courtois' treating doctor, establishes that Mr. Courtois' ASD diagnosis replaced his various childhood mental health diagnoses. Since Mr. Courtois is not currently dually diagnosed with ASD and any other mental illness, the BOA Review Judge's application of [DDA's dual diagnosis rules] in his case was an error of law.

CP 624 (Final Order at COL 2.4).

Regarding the factual claims in the DSHS BOA Review Judge's *Review Decision and Final Order* and *Order of Reconsideration*- that the otherwise qualifying adaptive testing in the record was not "effectively administered" by the school psychologist who scored the test and wrote the resulting report- the trial court concluded that:

> the review judge's determination that the qualifying adaptive function testing in this case was not properly "administered and scored" is not supported by substantial evidence in view of the record as a whole. The review judge's determination that the adaptive function testing in this case does not meet the requirements of WAC 388-823-0740(1)(a) is an error of law.

CP 625 (Final Order at COL 2.6).

The trial court ultimately concluded that:

> [t]he record in this case establishes that Mr. Courtois meets every listed requirement for DDA eligibility in the

> Department's rules based on his diagnosed ASD, and his DDA qualifying adaptive and IQ test scores.

Id (Final Order at COL 2.7).

The court ordered the Department's termination of Mr. Courtois' DDA eligibility reversed. *Id.* The trial court's *Final Order on Petition for Judicial Review of State Agency Action* reserved ruling on Mr. Courtois' right to an award of fees and costs, including reasonable attorney fees, under the EAJA. CP 626.

Mr. Courtois' motion for attorney fees and costs under the EAJA was filed on June 17, 2016. CP 628. The declaration of counsel that accompanied the motion sought $259 in costs and $8025 in attorney fees for 53.5 hours spent litigating Mr. Courtois' Petition for Judicial Review in Superior Court. CP 629.

The trial court denied Mr. Courtois' motion for attorney fees and costs on July 8, 2016. CP 642. The order denying the motion contained only two findings: "(1) the Department had a reasonable basis in law and fact for the agency action," and "(2) the Department was substantially justified in its action." *Id.*

Mr. Courtois' Notice of Appeal of the trial court's order denying fees and costs was filed on August 5, 2016. CP 643.

V. ARGUMENT

1. Standard of Review

The standard of review for a trial court's decision denying an award of fees and costs under the EAJA is abuse of discretion. *Constr. Indus. Training Council,* 96 Wn. App. 59, 66, 977 P.2d 655 (Div. I, 1999). The trial court commits an abuse of discretion where "there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." *Moreman v. Butcher,* 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (*citing State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)); *Coggle v. Snow,* 56 Wn. App. 499, 506–07, 784 P.2d 554 (Div. I, 1990).

The Court of Appeals uses a three-part analysis in determining whether the trial court's decision was manifestly unreasonable, or was based on untenable grounds, or for untenable reasons. *State v. Rundquist,* 79 Wn. App. 786, 793, 905 P.2d 922 (Div. II, 1995) *review denied,* 129 Wn.2d 1003, 914 P.2d 66 (1996). First, the trial court acted on untenable grounds if its factual findings are unsupported by the record. Second, the trial court acted for untenable reasons if it used an incorrect standard, or the facts do not meet the requirements of the correct standard. Third, the court acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard. *Id.* (*citing* Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993).

In Mr. Courtois' case, the trial court denied attorney fees under the EAJA based on a finding that the DSHS BOA orders that affirmed the termination of his DDA eligibility were "substantially justified." This finding is contradicted by the trial court's own findings and conclusions on the merits that those same agency orders violated the plain language of the agency's own eligibility rules, and contained fact finding that was not supported by substantial evidence. The trial court's failure to consider the obvious connection between the legal standard under the EAJA, and its own findings and conclusions on the merits in Mr. Courtois' case, constituted an abuse of discretion.

2. Requirements for an Award of Fees and Costs, Including Reasonable Attorney Fees, Under Washington's EAJA.

The Washington Legislature adopted the state EAJA in 1995 based on recognition that individuals of "limited means" may be:

> deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings.

1995 Wash. Legis. Serv. Ch. 403 § 901 (West). The legislature enacted the fee shifting provisions of the EAJA "to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights." *Id.* The statute directs the court conducting judicial review proceedings to:

> award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.

RCW 4.84.350.

The statute defines a "qualified party," who may be awarded fees and other expenses, as "an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed..." RCW 4.84.340(5). A party "prevails" if the court orders relief "on a significant issue that achieves some benefit that the qualified party sought." RCW 4.84.350(1). The final order issued by a DSHS review judge in an administrative appeal is the "agency action" to be judged by the court considering an EAJA fee award. *Costanich v. Washington State Dep't of Soc. & Health Servs.,* 138 Wn.App. 547, 563-64, 156 P.3d 232, 240 (Div. I, 2007), *as amended on reconsideration* (May 3, 2007), *rev'd on other grounds,* 164 Wn. 2d 925, 194 P.3d 988 (2008).

In order to establish that its final orders were "substantially justified," and thereby avoid an award of fees and costs under the EAJA, the agency must show that the orders had "a reasonable basis in law and fact." *See Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.,* 159 Wn. 2d 868, 892, 154 P.3d 891, 904

(2007)(*quoting Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 420, 97 P.3d 17 (Div. III, 2004)).

In Mr. Courtois' case, there was no dispute before the trial court either that he is a "qualified party" for purposes of an EAJA fee award, or that he "prevailed" in his Petition for Judicial Review. *See* CP 637. The trial court's order denied Mr. Courtois' motion for award of fees and costs under the EAJA based solely on two findings: "(1) The Department had a reasonable basis in law and fact for the agency action," and "(2) The Department was substantially justified in its action." CP 642.

The trial court's findings that the DSHS BOA review judge's final orders in Mr. Courtois' case had "a reasonable basis in law and fact" ignored the significant similarities discussed below between the legal standards in the Washington's APA by which the trial court reversed those orders, and the standard by which those same orders may be judged to be "substantially justified," or not, for purposes of an EAJA fee award.

3. Under the APA Standard of Review, the Trial Court Could Not Have Reversed the Agency's Legal Conclusions or Fact Finding in Mr. Courtois' Case if They Had Been Reasonable.

Under the APA, a court may grant relief from an agency's order arising from an adjudicative proceeding only if it determines that one or more of the statutory bases for relief enumerated in RCW 34.05.570(3) are established. *Edelman v. State*, 160 Wn. App. 294, 303–04, 248 P.3d 581,

586 (Div. II, 2011)(*citing Heidgerken,* 99 Wn. App. at 380, 384, 993 P.2d 934 (Div II, 2000)).

The two statutory bases by which the court reversed the agency orders in Mr. Courtois' case were RCW 34.05.570(3)(d) ("the agency has erroneously interpreted or applied the law"), and RCW 34.05.570(3(e) ("[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court."). The standard by which the Court may determine that these statutory bases for reversal of an agency's adjudicative order is highly deferential to the agency decision-maker, and permits reversal of the agency's findings and conclusions only if they are clearly unreasonable.

a. The trial court's determination that DSHS erroneously interpreted and applied its own dual diagnosis rule in Mr. Courtois' case required a showing that the agency's interpretation violated the plain language of the rule itself, and was, therefore, clearly unreasonable.

It is well established that a court will generally defer to an agency's interpretation of its own rules or a statute under its purview. *See e.g., City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Judicial review under RCW 34.05.570(3)(d) of a petitioner's claim that an agency erroneously interpreted and applied its own rule is therefore extremely

constrained. The court will generally find that the agency decision maker committed an error of law in interpreting the agency's own regulation only where the agency decision-maker's announced interpretation clearly conflicts with the plain language of the rule itself. *See Waste Mgmt. of Seattle v. Utilities and Transportation Commission,* 123 Wn.2d 621, 628, 869 P.2d 1034 (1994).[5] Where a statute or rule is at all ambiguous, and is open to more than one reasonable interpretation, the court must defer to the agency announced interpretation. *See e.g., Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (An agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation.") (citations and internal quotation marks omitted).

In the present case, the DSHS BOA Review Judge rejected Mr. Courtois' otherwise qualifying IQ and adaptive test scores based on assertions announced by the agency review judge that DDA's dual diagnosis rules applied retroactively, and required that the agency consider multiple past diagnoses that Mr. Courtois' medical provider had since

[5] Rules of statutory construction "apply equally to administrative rules and regulations." *Odyssey Healthcare Operating BLP v. Washington State Dep't of Health*, 145 Wash. App. 131, 141, 185 P.3d 652, 657 (2008)(*citing Children's Hosp. and Med. Ctr. v. Wash. State Dep't of Health,* 95 Wash.App. 858, 864, 975 P.2d 567 (Div. II, 1999).

replaced with his current singular DDA-qualifying ASD diagnosis. The agency review judge's erroneous determination that DDA dual diagnosis rules applied retroactively was rejected by the court based on review of the plain language of the rules themselves – rules that are clearly written in the present tense, and clearly apply only to applicants who are presently dually diagnosed.

The court was able to conclude that the agency's interpretation and application of its own eligibility rule constituted an error of law only because the plain language of the rules themselves is clear and unambiguous. The agency's announced interpretation was deemed to be erroneous by the court only because it violated the plain language of the rules themselves, and was therefore clearly unreasonable.

b. The trial court's reversal of the agency's fact-finding regarding the administration of the adaptive testing in Mr. Courtois' case required a showing that the agency's factual claim was not supported by substantial evidence, and was, therefore, clearly unreasonable.

The Court may reverse findings of fact contained in an agency's adjudicative order only if it is not supported by "evidence that is substantial in view of the record as a whole." RCW 34.05.570(3)(e). To be "substantial," the evidence in the record in support of the agency's fact finding need not be irrefutable or overwhelming. It need only be of

factual determinations are true and correct. *See The Cooper Point Ass'n v. Thurston Co.*, 108 Wn.App. 429, 436, n.8, 31 P.2d. 28 (Div. II, 2001). The court's "review is deferential and entails acceptance of [the agency] fact finder's views regarding credibility of witnesses and weight to be given reasonable but competing inferences." *Callecod v. Wash. State Patrol,* 84 WnApp. 663, 676 n. 9, 929 P.2d 510 (Div. I, 1997), *see also Alpha Kappa Lambda Fraternity v. Washington State Univ.*, 152 Wn. App. 401, 418, 216 P.3d 451, 460 (Div. III, 2009)(commenting that "[t]he substantial evidence standard, like the arbitrary and capricious standard, is highly deferential to the agency fact finder.").

In the present case, the DSHS review judge's factual finding that the qualifying adaptive function testing was not "effectively administered and scored by a qualified professional" was not supported by any evidence in the record, and was contradicted by extensive and un-refuted evidence submitted by Mr. Courtois confirming that the test was properly administered by the school psychologist who scored the test and wrote the resulting report. The agency's fact finding that the test was not properly administered was rejected by the court because it was not reasonable in light of the record as a whole, i.e., it was not supported by either the amount or type of evidence in the record that a fair minded (i.e., reasonable) person would rely on.

4. The standard in Washington's EAJA by which an agency action is judged to be not "substantially justified" is equivalent to the reasonableness standard that the court had already determined DSHS violated in Mr. Courtois' case.

Because the Washington EAJA is patterned after the federal EAJA, state courts have adopted the definition of "substantially justified" announced in federal case law. *Alpine Lakes Prot. Soc'y v. Washington State Dep't of Nat. Res.*, 102 Wn. App. 1, 19, 979 P.2d 929, 938 (Div. I, 1999). Under the adopted federal definition, an agency action is "substantially justified" when it is "justified in substance or in the main," and therefore "justified to a degree that could satisfy a reasonable person." *Id* (*quoting Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). It is the state agency's burden to establish that its action was "justified to a degree that would satisfy a reasonable person." *Silverstreak, Inc.* 159 Wn. 2d at 892. To do so, the agency must establish that its action had "a reasonable basis in law and fact." *Id* (*quoting Cobra Roofing Serv., Inc.,* 122 Wn. App. at 420.

In determining whether the agency's action had "a reasonable basis in law and fact" and was therefore was "justified to a degree that would satisfy a reasonable person," the court considers "the strength of the factual and legal basis for the action." *Silverstreak*, 159 Wn.2d at 892.

In the present case, the trial court ruling on the merits specifically addressed the strength of both the factual basis and the legal basis for the Department's final orders that affirmed the termination of Mr. Courtois' DDA eligibility. The BOA review judge's fact finding regarding the administration of Mr. Courtois' qualifying adaptive testing was rejected by the court specifically because it was not supported by evidence sufficient to persuade a reasonable person. The BOA review judge's legal conclusions regarding DDA's dual diagnosis rules were similarly determined to be so unreasonable that they violated the plain language of the rules themselves.

Given the trial court's specific ruling on the merits, and the required standard under the APA by which those rulings were made, neither the BOA's legal conclusions nor its fact finding could possibly be "justified to a degree that could satisfy a reasonable person."

a. Agency fact-finding that is not supported by substantial evidence cannot be "substantially justified."

No published Washington court decision explicitly equates the "substantial evidence" standard in the APA, by which a court reviews the agency's fact finding, with the "substantially justified" standard in the state EAJA. However, the U.S. Supreme Court's opinion in *Pierce v. Underwood,* 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988),

contains an extensive and instructive discussion of the "substantially justified" standard in the federal EAJA. *Id.* at 563-568

In elaborating on the meaning of statutory phrase, Justice Scalia, writing for the majority, specifically equated the phrase "substantially justified" with the "substantial evidence" standard, by which agency fact finding is judged on judicial review:

> We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of "substantial evidence" set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E). That phrase does not mean a large or considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Id. at 564–65 (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938).

In *Thangaraja v. Gonzales*, 428 F.3d 870, (9th Cir. 2005), the Ninth Circuit Court of Appeals more explicitly commented on the connection announced by the Supreme Court in *Pierce* between the APA "substantial evidence" standard for agency fact-finding, and the "not substantially justified" standard for an EAJA award:

> Our holding [on the merits] that the agency's decision of Thangaraja's case was unsupported by substantial evidence is therefore a strong indication that the "position of the United States" in this matter was not substantially justified. Indeed, it will be only a "decidedly unusual case in which there is substantial justification under the EAJA even though the agency's

> decision was reversed as lacking in reasonable, substantial and probative evidence in the record."

Id at 874 (*quoting Al-Harbi v. I.N.S.,* 284 F.3d 1080, 1085 (9th Cir. 2002)).

Commentators on the Washington EAJA have similarly made the point that the substantial evidence standard, by which an agency's fact finding may be reversed on judicial review only if it is not supported by substantial evidence, is essentially identical to the "not substantially justified" standard, by which attorney fees and costs may be awarded under the EAJA:

> Because a court can overturn an agency's factual determination only if it is not based on substantial evidence, the substantial justification limit [in Washington's EAJA] is redundant. Both questions turn on the same determination of reasonableness: an action cannot be substantially justified unless it has a reasonable basis, and the determination that an agency action was without substantial evidence turns on whether the evidence is sufficient to convince a reasonable person. Because the legislature stated that the WEAJA was adopted to encourage citizens to defend themselves against "inappropriate state agency actions" and against "unreasonable agency action," it is illogical to conclude that they intended to exempt state agency actions that are not based on evidence sufficient to convince a reasonable person.

D. Greg Blankinship, *The Washington Equal Access to Justice Act: A Substantial Proposal for Reform*, 77 Wash. L. Rev. 169, 189 (2002); *see also* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct*

(Part Two), 56 La. L. Rev. 1, 41 (1995)(commenting that '[w]hen a case on the merits involves true rational review, under which the government action is overturned precisely because it is unreasonable, then an award of fees under the EAJA should ineluctably follow.").

The Court of Appeals in Mr. Courtois' case should similarly conclude, as a matter of law, that state agency fact-finding that is reversed by the court under the APA because it is not supported by "substantial evidence," cannot also be "substantially justified" for purposes of an EAJA fee award. Both determinations involve an identical reasonableness standard.

In Mr. Courtois' case, the trial court determined that the agency's fact finding regarding the administration of the adaptive testing was unreasonable for purposes of the court's determination on the merits. The trial court committed an abuse of discretion when it then determined the same fact finding to be reasonable (and thus substantially justified) in its order denying Mr. Courtois' motion for fees and costs under the EAJA. The Court of Appeals should reverse the trial court's determination that the BOA fact finding contained in the final agency orders in Mr. Courtois' case was substantially justified.

b. Agency conclusions of law that violate the plain language of the agency's own eligibility rules cannot be "substantially justified."

Although no published Washington court decision has explicitly held that a state agency's conclusion of law that violates the plain language of its own eligibility rules a cannot be "substantially justified" for purposes of an EAJA fee motion, multiple Washington cases have identified and discussed factors by which an agency's legal conclusions are to be judged under the EAJA. A review of those cases indicates that where there is no ambiguity in the law, and no reasonable basis for the agency's legal claims, the agency's conclusions of law cannot be substantially justified.

Courts have found EAJA awards proper where the agency's position regarding the requirements of its governing statute "begs reason," *See Alpine Lakes Prot. Soc'y,* 102 Wn. App. at 19; and where the agency's action was not permitted by the governing statute, *Moen v. Spokane City Police Dep't,* 110 Wn. App. 714, 721, 42 P.3d 456, 460 (Div. III, 2002), and where the agency's regulation clearly conflicted with the terms of its governing statute. *H & H P'ship v. State*, 115 Wn. App. 164, 171, 62 P.3d 510, 513–14 (Div. II, 2003)

In contrast, courts have reversed agencies on the merits, yet concluded that the agency's legal position was "substantially justified" for the purpose of defeating an EAJA fees motion, where there was

conflicting case law interpreting the requirements of the governing statute, *see Schrom v. Bd. For Volunteer Firefighters*, 117 Wash. App. 542, 552, 72 P.3d 239, 244 (Div III. 2003), *rev'd on other grounds Schrom v. Bd. For Volunteer Fire Fighters*, 153 Wash. 2d 19, 100 P.3d 814 (2004); where the agency's legal determinations "relied on existing favorable Washington case precedent," *see Silverstreak, Inc.* 159 Wn. 2d at 892; and where "the case was "highly complex, involving the intersection of detailed statutes with somewhat confused common law." *See Dep't of Labor & Indus. of State v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 542, 347 P.3d 464, (Div. II, 2016).

Mr. Courtois' case is clearly much more analogous to the cases cited involving an agency's obvious violation of plain terms of its governing statute. The agency review judge's retroactive application of the the agency's own dual diagnosis rules clearly violated the plain present-tense language of the rules themselves. There was no ambiguous terminology, and no confused case law or conflicting statutory provisions. The trial court reversed the agency on the merits based on its determination that the terms of the regulations at issue were clear and unambiguous, and clearly applied only to individuals with current dual diagnoses.

The trial court's subsequent determination, for purposes of the EAJA motion, that the agency's legal conclusion had a "reasonable basis in law," and was therefore substantially justified, was contradicted by the court's findings on the merits, and constituted an abuse of discretion. [6] It should be reversed by the Court of Appeals.

5. The Court Should Authorize an Award of Reasonable Attorney's Fees on Appeal Pursuant to RAP 18.1 and RCW 4.84.350.

Time spent on establishing entitlement to a court awarded attorney fee is compensable where the fee shifts to the opponent under fee shifting statutes. *Costanich,* 164 Wn.2d at 933–34, 194 P.3d at 992–93 (2008)(*citing Fisher Props., Inc. v. Arden–Mayfair, Inc.,* 115 Wn.2d 364, 378, 798 P.2d 799 (1990)). The EAJA permits a qualified prevailing party to recover a separate award of fees and costs, including reasonable attorney's fees, at each level of court review. *Costanich*, 164 Wn.2d at 934.

In the present case, Mr. Courtois is a qualified prevailing party entitled to recover statutory fees and costs under the EAJA for both the

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[6] *See e.g., Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996)(commenting that "[a] finding than an agency's position was substantially justified when the agency's position was based on violations of the Constitution, federal statute or the agency's own regulations, constitutes an abuse of discretion."), *see also Yang v. Shalala*, 22 F.3d 213, 217 (9th Cir. 1994)(commenting that "where the agency's position was based on violations of the Constitution, the Social Security Act, and several SSA regulations," the district court abused its discretion by finding that the Secretary's position was reasonably based in law")

proceedings in Superior Court, and for the present appeal to the Court of Appeals, Division II.[7] The Court of Appeals should award fees and costs under the EAJA for this appeal.

VI. CONCLUSION

The Court of Appeals should reverse the trial court's denial of Mr. Courtois' motion for attorney fees and costs under the EAJA. The trial court's determination that the agency's final orders in Mr. Courtois' case were substantially justified is contradicted by the court's own findings and conclusions that resulted in the reversal of those same agency orders on judicial review. The Court of Appeals should clarify and confirm that a state agency's adjudicative order cannot both violate the plain language of its own eligibility rules and be unsupported by substantial evidence, and yet still be "substantially justified" under Washington's EAJA.

RESPECTFULLY SUBMITTED this 21st day of October, 2016.

NORTHWEST JUSTICE PROJECT

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[7] Mr. Courtois' affidavit of financial need confirming his financial eligibility for an EAJA award for the present appeal to the Court of Appeals will be separately filed and served no later than 10 days prior to oral argument in this matter as required by RAP 18.1(c).

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CERTIFICATE OF SERVICE

I certify that today, the 21st day of October, 2016, a true and accurate copy of the foregoing **Opening Brief of Appellant** in the above-entitled matter was sent by both first-class mail and e-mail to the attorney for Respondent in this matter:

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DATED this 21st day of October, 2016.

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NORTHWEST JUSTICE PROJECT

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